Therefore, American courts have long recognized that the presence of an officer inside a dwelling is unlawful if he or she entered the dwelling in an illegal manner even if he or she had legal authority. *See, e.g., Ilsley v. Nichols*, 29 Mass. 270, 281 (1831) ("An officer, having a valid writ, if he does not pursue the authority given him by his writ, and the rules of law in the execution of his duty under it, is a trespasser, in the same manner as if he had no writ"); *State v. Armfield*, 9 N.C. 246 (1822) (holding that an officer who illegally breaks open a door to serve a civil process "is a trespasser"); *Curtis v. Hubbard*, 4 Hill 437 (N.Y. Sup. Ct. 1842) ("The . . . question is whether a sheriff, who has entered the house of another in direct violation of the law, for the purpose of arresting the owner or seizing his goods, can be justified in consummating the wrong by arresting his person or removing the goods, where it is all one continuous act. I think, upon authority as well as upon principle, he cannot."). This Court, of course, reached the same conclusion in suppressing the evidence seized inside the homes in *Miller* and *Sabbath*, since the officers in those cases had, or were assumed to have, lawful authority to perform the entries.

Respondent, however, argues that the manner of entry is irrelevant to the Fourth Amendment reasonableness of the police activity inside the dwelling. Once the officer is inside, Respondent maintains, it no longer matters if he unreasonably breached the door because that illegality is now over. It follows from Respondent's argument that it would not matter if the officer used dynamite to make the unannounced entry or if he sneaked in through the bedroom window. Yet, as this Court has squarely recognized, "the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the

factors to be considered in assessing the reasonableness of a search or seizure." *Wilson*, 514 U.S. at 931.

In short, if an officer violates the knock and announce requirement, the warrant in his hand does not change the fact that his presence inside the home is both illegal and unreasonable. The evidence the officer finds inside the home is the fruit of that unlawful entry because that illegal entry is used to accomplish the search of the dwelling. In this case, then, Officer Good would not have been in a position to arrest and search Petitioner had Officer Good not entered the home. As the entry was concededly illegal, the arrest and search of Petitioner inside his home was the fruit of that illegal entry.[2]

In this regard, Respondent's heavy reliance on *New York v. Harris*, 495 U.S. 14 (1990), is puzzling. *See* Respondent's Brief at 22-25. In *Harris*, this Court held that since the rule of *Payton v. New York*, 445 U.S. 573 (1980), was designed to reflect the "overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic," 495 U.S. at 17, no purpose would be served in excluding the statements Harris made after he was removed from the home.

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[2] At pages 16-18 of its brief, the United States points to the dicta in *Ramirez*, 523 U.S. at 71, suggesting that evidence might not have been suppressed even if the Court had concluded that the officers had engaged in excessive or unnecessary property destruction. But *Ramirez* plainly states that this suggestion might apply only so long as "the entry itself is lawful." *Id.* While it is not at all clear whether an entry becomes illegal if the police performing that entry also engage in unnecessary property destruction, *see id.* at 72 n.3 (declining to decide whether the evidence would have been suppressed had a violation occurred), it is beyond reasonable dispute from centuries of precedent that a knock and announce violation does make the entry illegal.

In relying on *Harris*, Respondent overlooks this key passage:

> [S]uppressing the statement taken outside the house would not serve the purpose of the rule that made Harris' in-house arrest illegal. *The warrant requirement for an arrest in the home is imposed to protect the home, and anything incriminating the police gathered from arresting Harris in his home, rather than elsewhere, has been excluded, as it should have been*; the purpose of the rule has thereby been vindicated.

Id. at 20 (emphasis added).

The point from *Harris*, then, is that a violation of the *Payton* rule, which is meant to protect the integrity of the home, should not result in the suppression of evidence obtained elsewhere. Petitioner therefore agrees that the knock and announce rule, which is also intended to protect the home, likewise should not result in the suppression of evidence obtained elsewhere. But *Harris* reaffirms that it is necessary to suppress evidence obtained from a home to vindicate a rule designed to protect the integrity of the home. *Harris* thus supports Petitioner's position.

3. Respondent's Rule Would Remove Much Police Activity from the Exclusionary Rule on a *Per Se* Basis.

This Court has unanimously rejected a *per se* rule that would have excised the entire class of felony drug investigations from the knock and announce rule. *Richards v. Wisconsin*, 520 U.S. 385 (1997). Respondent's proposed rule would go much further than the rule rejected in *Richards*.

Respondent's argument, if accepted, would completely exempt the knock and announce doctrine from the exclusionary rule.[3] It would also remove from the exclusionary rule, on a *per se* basis, all other claims that an entry was performed in an unconstitutional manner. *See* Respondent's Brief at 33.

Respondent makes clear, however, that it would not stop there. Respondent claims that if this Court accepts Petitioner's position, a variety of Fourth Amendment violations would result in automatic suppression of all evidence. Respondent's Brief at 24-27. In particular, Respondent maintains that Petitioner's argument would necessarily result in the suppression of all evidence found after: (1) a search that exceeds the scope of the warrant but produces evidence within the scope of the warrant; (2) an arrest achieved with excessive force; and (3) a search in which the officers permit the media to observe in violation of *Wilson v. Layne*, 526 U.S. 603 (1999).

Petitioner does not argue that all evidence obtained after such violations must necessarily be suppressed. On the contrary, Petitioner rejects such *per se* rules and agrees that the exclusionary rule must be applied only

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[3] Taking a slightly different tack, the United States concludes that exclusion would be appropriate for a knock and announce violation only for evidence "acquired as a direct consequence of the prematurity of the entry." Brief of United States at 19. The only example of such evidence is "excited utterances prompted by an unannounced, premature, or forceful entry." *Id.* at 20. Not surprisingly, the United States cites no cases in which defendants have sought to exclude such utterances prompted solely by the manner of entry, and Petitioner is aware of none. In practice, then, the rule advocated by the United States would also result in the *per se* admission of all evidence found after knock and announce violations.

when its deterrent purpose is served. While Respondent assumes that evidence found after such violations must always be admissible, this Court has never issued such a holding for any of these three types of violations. In fact, the lower courts have sometimes suppressed evidence found after such violations.[4]

Respondent's conclusion that the evidence the police find after these types of violations must always be admissible is consistent with Respondent's view that whole categories of Fourth Amendment activity are entirely beyond the reach of the exclusionary rule. Petitioner, by contrast, does not take the opposite position that all evidence found after all types of violations must be suppressed. In Petitioner's view, the test for determining whether evidence should generally be suppressed for each category of violation is the one the Court has used for many years: whether suppression is appropriate in light of the deterrence policies that underlie the exclusionary rule.

In the case of knock and announce violations, suppression of evidence found inside following such a violation is appropriate because it is necessary to deter officers from routinely violating the rule. Suppression of evidence found outside the home is not appropriate for the reasons set forth in *Harris*, and suppression of evidence found inside the home may be inappropriate if the evidence was the

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[4] *See, e.g., United States v. Foster*, 100 F.3d 846, 851-853 (10th Cir. 1996) (suppressing all evidence seized under warrant where officers grossly exceeded scope of warrant); *State v. Hodson*, 907 P.2d 1155, 1159 (Utah 1995) (suppressing evidence seized after officer used excessive force to perform arrest); *Thompson v. State*, 824 N.E.2d 1265, 1269-1271 (Ind. Ct. App. 2005) (suppressing evidence found by police during strip search which police permitted media to observe).

product of a source independent of the illegal entry or if the evidence inevitably would have been discovered through such an independent source.[5]

In short, Petitioner does not advocate a *per se* rule of exclusion even for knock and announce violations, much less a *per se* rule that would apply in other contexts. It is Respondent that advocates a *per se* rule that would remove much of the Fourth Amendment (and presumably many other constitutional protections as well) from the reach of the exclusionary rule.

In sum, Respondent's argument is impossible to square with *Miller*, *Sabbath*, and *Wilson*, each of which stands for the proposition that knock and announce violations produce illegal entries and, therefore, unreasonable searches and seizures inside the home. Respondent's arguments are not only inconsistent with this Court's knock and announce precedents but would also foreclose the possibility of evidentiary exclusion for a host of other Fourth Amendment and criminal procedure doctrines.

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[5] Thus, Petitioner does not maintain that evidence found through an overbroad search of a vehicle incident to arrest must be suppressed even if the prosecution can show that the car inevitably would have been impounded and subjected to an inventory search. *See* Respondent's Brief at 27-28. In such a situation, a reviewing court might well conclude that the inventory constitutes a process wholly independent of the illegal search that occurred. The reviewing court would still have to consider, as this Court did in *Nix*, whether failure to suppress would undermine the deterrence rationale if the officer who committed the violation knew that the evidence would always be regarded as inevitably discovered through inventory. But this example illustrates the difference between a defensible inevitable discovery argument where there actually is an independent source or process and an indefensible inevitable discovery argument, such as in the present case, where there is no independent source or process of any kind.

B. Application of the Exclusionary Rule Is Necessary To Deter Knock and Announce Violations.

Petitioner certainly agrees with Respondent that the "purpose of the exclusionary rule is to deter improper police conduct by denying the Government the fruit of that conduct." Respondent's Brief at 6.[6] It is surprising, therefore, that Respondent makes almost no effort to explain how police officers would be deterred from committing knock and announce violations in the absence of an exclusionary sanction. Respondent notes the possibility of civil litigation, *see* Respondent's Brief at 34 & n.66, while ignoring Petitioner's argument that such litigation is certain to be ineffective for an ordinary knock and announce violation because of the absence of tangible damages. It is telling that Respondent and its *amici* do not cite a single case where anyone has recovered actual damages solely for a knock and announce violation. If such cases exist, they must be exceedingly rare.

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[6] Respondent follows this statement with a historical review suggesting that the exclusionary rule is illegitimate. Respondent's Brief at 6-11. One of Respondent's *amici* questions whether the exclusionary rule deters police misconduct at all. *See* Brief of Criminal Justice Legal Foundation at 5 ("proving that the exclusionary rule actually does deter police misconduct may be impossible"). The exclusionary rule is a well-established feature of American law and there is substantial empirical research demonstrating that the exclusionary rule does deter police misconduct. *See, e.g.*, Myron W. Orfield, *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U.Colo.L.Rev. 75 (1992); Craig Uchida & Timothy S. Bynum, *Search Warrants, Motions to Suppress and "Lost Cases:" The Effects of the Exclusionary Rule in Seven Jurisdictions*, 81 J.Crim.L. & Criminology 1034 (1991); L. Paul Sutton, *"Getting Around the Fourth Amendment," in* Thinking About Police (Contemporary Readings) 433 (Carl B. Kockars & Stephen D. Mastrofski eds., 1991).

Indeed, Respondent concedes that in cases such as this one where officers violated the knock and announce rule without destroying the door, "damages may be virtually nonexistent." *Id.* at 35 n.66. *See also* Brief of Criminal Justice Legal Foundation at 10 (conceding that governmental immunities and the lack of alternative remedies "prevent substituting tort law for the exclusionary rule at this time").

The United States, by contrast, does argue the deterrence point. First, the United States claims that the possibility that someone might make an excited utterance solely because of the "prematurity of the entry" is enough to deter officers from violating the rule. Brief of United States at 23. The fact that the United States cannot cite one case where such an utterance has been made is sufficient to defeat a claim that such an unlikely eventuality is enough to deter violations of the rule.

Second, the United States claims that police will comply with the rule to protect themselves from being shot by residents who would not otherwise realize that it is the police coming through the door. Brief of United States at 24. But as the United States later observes, the officers in this case protected themselves "from being mistaken as unlawful intruders" by announcing their purpose and identity and then immediately barging in. *Id.* at 28. In other words, the United States is correct that in the absence of an exclusionary sanction officers might still announce before executing a search warrant in order to avoid being shot by mistake, *but they will not wait a reasonable time for a resident to open the door.* Thus, the police might observe that part of the rule that helps protect themselves, but the primary purpose of the rule is to affirm "the reverence of the law for the *individual*'s

right of privacy in his house." *Miller*, 357 U.S. at 313 (emphasis added). That primary purpose will not be served without an exclusionary sanction.

This case proves that point. Officer Good testified that he and the other officers announced their presence and then immediately proceeded to go through the door. When asked why he did not wait for anyone to answer the door, he responded, "It's a safety factor. I've been shot at numerous times going into drug houses. So it's a safety factor." J.A. 20. Officer Good was thus following precisely the type of *per se* rule excluding drug searches from the knock and announce rule that this Court had rejected one year earlier in *Richards*. There should be no serious question that police officers nationwide will routinely violate the knock and announce rule, just as Officer Good did, if this Court accepts Respondent's argument.

Finally, the United States claims that application of the exclusionary rule to knock and announce violations risks overdeterrence. *See* Brief of United States at 24. Yet the United States presents no support for the proposition that officers are overdeterred in the vast majority of jurisdictions that currently suppress evidence seized after knock and announce violations. *See* Petitioner's Brief at 16-17 (collecting cases from twenty-four jurisdictions). If officers have reasonable suspicion that complying with the knock and announce rule will endanger them or risk destruction of evidence, they may seek a no-knock warrant or simply dispense with the requirement at the scene. *Richards*, 520 U.S. at 394-396. But as this Court recognized in *Richards*, it is not too much to ask the officers to have such a reasonable suspicion before violating a venerable rule central to a citizen's right to privacy in his or her home. *See id.* at 394 (concluding that the reasonable

suspicion standard "strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of search warrants and individual privacy interests affected by no-knock entries").

The availability of the exclusionary sanction is also necessary to assure compliance with the knock and announce rule because the rule will become a dead letter without it. If this Court adopts the *per se* rule currently in place in Michigan, criminal defendants nationwide will stop filing motions to suppress evidence seized after knock and announce violations, and the courts will almost never have occasion to decide whether knock and announce violations have occurred.[7]

At bottom, the arguments of Respondent and its *amici* betray a sharp disdain for the knock and announce rule itself. Respondent repeatedly argues that the only justification for suppression would be if the rule were intended to give defendants an opportunity to destroy evidence. Respondent's Brief at 3, 35-36. The United States attempts to downplay the importance of the knock and

[7] The United States argues, with a citation to *United States v. Leon*, 468 U.S. 897 (1984), that courts in criminal cases might continue to decide whether knock and announce violations occurred before rejecting suppression motions because of the unavailability of the exclusionary sanction. Brief of United States at 27-28 n.10. The United States thus misses the point that, unlike motions to suppress because of an alleged lack of probable cause in the warrant (which are still frequently filed after *Leon* because such motions can still succeed), motions to suppress because of knock and announce violations will *never* be filed if there is no possibility of excluding evidence seized after such violations. Therefore, even if trial judges in criminal cases were inclined to waste their time by deciding purely academic knock and announce questions, they will never have any occasion to do so if Respondent prevails.

announce rule by ubiquitously referring to violations of the rule as mere "premature entries." *See, e.g.*, Brief of United States at 6, 7, 12, 19; *see also id.* at 19 (arguing evidence should not be suppressed when "the only illegality that occurs during the execution of the warrant is the police's failure to wait a few additional moments after knocking and announcing before entering the premises"); *id.* at 29 ("violation consists solely of their having entered the residence a few seconds early").

Contrary to the suggestions of Respondent and the United States, the knock and announce rule is not a minor technicality designed to assist criminals in disposing of their incriminating evidence. The rule, which dates back to the era of the Magna Carta, is based on "the reverence of the law for the individual's right of privacy in his house." *Miller*, 357 U.S. at 313. The rule is intended to protect residents from the shock and embarrassment that often follows a precipitous police entry and to allow residents a chance to prevent destruction of their property. *See Richards*, 520 U.S. at 393 n.5.

If this Court accepts Respondent's invitation to remove the knock and announce rule from the reach of the exclusionary rule, it is a certainty that police officers nationwide will routinely do as Officer Good and his fellow officers did in this case. They will flagrantly disregard a venerable doctrine that is a core part of the right of the people to be secure in their homes. This Court has already recognized that the *per se* exemption of certain categories of criminal investigation would have made the knock and announce requirement "meaningless." *Id.* at 394. If all violations of the knock and announce rule are to be categorically exempted from the exclusionary sanction, it

"might as well be stricken from the Constitution." *Weeks v. United States*, 232 U.S. 383, 393 (1914).

CONCLUSION

The judgment of the Michigan Court of Appeals should be reversed, and the case should be remanded to that court with instructions to reverse Petitioner's conviction.

Respectfully submitted,

DAVID A. MORAN
Counsel of Record
WAYNE STATE UNIVERSITY
LAW SCHOOL
471 W. Palmer Street
Detroit, Michigan 48202
(313) 577-4829

TIMOTHY O'TOOLE
633 Indiana Avenue, N.W.
Washington, DC 20004
(202) 628-1200

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street, 18th Floor
New York, New York, 10004
(212) 549-2611

MICHAEL J. STEINBERG
KARY L. MOSS
AMERICAN CIVIL LIBERTIES
UNION FUND OF MICHIGAN
60 West Hancock Street
Detroit, Michigan 48201
(313) 578-6814

RICHARD D. KORN
645 Griswold Street
Suite 1717
Detroit, Michigan 48226
(313) 223-1000

Counsel for Petitioner

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In the Supreme Court of the United States

BOOKER T. HUDSON, JR., PETITIONER

v.

STATE OF MICHIGAN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
DAVID B. SALMONS
Assistant to the Solicitor General
DEBORAH WATSON
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether evidence seized pursuant to a valid search warrant must be suppressed because the officers who executed the warrant violated the Fourth Amendment's knock-and-announce requirement.

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INTEREST OF THE UNITED STATES

This case presents the question whether evidence seized pursuant to a valid search warrant must be suppressed when the police executing the warrant enter without complying with the Fourth Amendment knock-and-announce rule, but the evidence seized would have been discovered even if they had complied with the rule. Because the Court's resolution of that question will affect the admissibility of evidence offered in federal criminal prosecutions, the United States has a substantial interest in this case.

STATEMENT

1. At 3:35 p.m. on August 27, 1998, approximately seven Detroit police officers executed a search warrant for narcotics and weapons at petitioner's house. Officer Jamal Good testified that he neither saw nor heard any activity inside the house—a single family dwelling—as he and the other officers approached. Some of the officers shouted "police, search warrant" upon their arrival. After waiting three to five seconds, Officer Good turned the knob on the door, and the officers entered the house. Officer Good was a 14-year veteran of the Detroit Police force with six years of experience in the Narcotics Division. He testified that his entry was prompted by concerns for his safety, explaining that he had been shot at numerous times when executing narcotics search warrants. J.A. 4-5, 7-8, 19-20; 10/10/00 Tr. 10-16; 10/22/02 Tr. 5-9, 15-16.

Immediately upon entering the house, Officer Good saw petitioner seated on a chair in the living room. At least five other men and women were found running throughout the house. During the subsequent search, the police found on the chair in which petitioner had been sitting a plastic bag containing 23 individual zip-lock bags, each containing crack cocaine. They also discovered a loaded revolver protruding from between the cushion and armrest of the chair, as well as five rocks of cocaine weighing less than 25 grams and $225

cash inside petitioner's pants pockets. In addition, the police found a plastic bag on the living room coffee table containing two smaller baggies, each of which held 24 zip-lock bags of cocaine. J.A. 5-8, 17-20, 22; 10/22/02 Tr. 6, 9, 12-13, 17, 31, 33-39, 58-59; 10/23/02 Tr. 40-44.

2. Petitioner was charged with possession of less than 50 grams of cocaine with intent to deliver, in violation of Mich. Comp. Laws Ann. § 333.7401(2)(a)(iv) (West 2001), and possession of a firearm during the commission of a felony, in violation of Mich. Comp. Laws Ann. § 750.227b (West 2004). Petitioner moved to suppress the evidence, claiming, *inter alia*, that the police had violated the knock-and-announce requirement under the Fourth and Fourteenth Amendments, and that the evidence derived from the search should therefore be suppressed. J.A. 9-12.

At the evidentiary hearing, the prosecutor conceded, in light of Officer Good's testimony, that the police had violated the knock-and-announce requirement by waiting only three to five seconds before entering petitioner's home. The trial judge granted petitioner's motion to suppress. Pet. App. 9-10.

The State filed an interlocutory appeal, arguing that suppression was improper in light of the Michigan Supreme Court's decisions in *People* v. *Stevens*, 597 N.W.2d 53 (1999), cert. denied, 528 U.S. 1164 (2000), and *People* v. *Vasquez*, 602 N.W.2d 376 (1999), which held that the inevitable discovery doctrine of *Nix* v. *Williams*, 467 U.S. 431 (1984), generally rendered suppression inappropriate when officers failed to comply with the Fourth Amendment knock-and-announce requirement in making their entry to execute a valid warrant.

On May 1, 2001, the Michigan Court of Appeals reversed the suppression order, based on the decisions in *Stevens* and *Vasquez*. Pet. App. 4. Petitioner filed an application for leave to appeal to the Michigan Supreme Court. On December 18, 2001, the Michigan Supreme Court denied the application, reaffirming its decisions in *Stevens* and *Vasquez*. *Id*. at 5.

3. Following a bench trial on October 25, 2003, petitioner was convicted of possession of less than 25 grams of cocaine, and acquitted of the firearm charge. He was sentenced to 18 months of probation. J.A. 21-24.

Petitioner appealed his conviction, again arguing that the evidence seized in the warrant-authorized search should be suppressed because of the knock-and-announce violation. On June 17, 2004, the Michigan Court of Appeals affirmed petitioner's conviction, Pet. App. 1-2, and the Michigan Supreme Court subsequently denied his application for leave to appeal, *id.* at 3.

SUMMARY OF ARGUMENT

Because the exclusionary rule imposes significant costs on society by preventing the use at trial of reliable, probative evidence, the Court has carefully limited the rule's application to cases in which there is a significant causal connection between the discovery of evidence and the illegality. While the Court has articulated various doctrines—inevitable discovery, independent source, and rules that identify the "fruit of the poisonous tree"—to describe different ways in which a violation should not lead to suppression, they all reflect the principle that suppression is too high a price to pay for a particular violation when the causal link between the violation and the acquisition of evidence is weak, non-existent, or irrelevant to exclusionary-rule policies.

Such causation is completely lacking here. When officers seize evidence pursuant to a lawful warrant, the evidence is the product of the warrant, rather than the product of the unreasonable manner in which the police effected entry to execute the warrant. The warrant represents a judicial command that the officers search for and seize the evidence described in the warrant, and there is no dispute that the officers in this case would have lawfully entered petitioner's residence and discovered the same evidence if they had delayed

entry for the additional moments required by the knock-and-announce rule.

The evidence seized under warrant is therefore not the fruit of the particular government conduct that violated the Fourth Amendment, and suppression is therefore inappropriate. Indeed, application of the exclusionary rule in this context would put the government in a "*worse* position than it would otherwise have occupied" absent the illegality, contrary to this Court's express limitation on the exclusionary rule in *Murray* v. *United States*, 487 U.S. 533, 542 (1988) (emphasis added).

That conclusion is particularly clear given that the only claim of illegality asserted by petitioner involves the *manner* in which the officers executed the search warrant. Suppression of all the evidence is a mismatch because petitioner's Fourth Amendment interest here is not, as in a case involving the warrant or probable-cause requirements, in the items to be seized, but in the manner in which entry is achieved. This and other courts have repeatedly indicated that suppression is not an appropriate remedy for every illegality that might occur in the execution of a search warrant. Indeed, the Court has twice held that an initial illegal entry does not justify suppression of evidence subsequently seized pursuant to a valid warrant. See *Murray*, 487 U.S. at 536-541; *Segura* v. *United States*, 468 U.S. 796, 804 (1984).

Petitioner's assertion that, absent suppression of all of the fruits of the search, police will routinely ignore the knock-and-announce rule is mistaken. Not only does that view inappropriately presume the bad faith of police officers, but suppression remains an appropriate remedy if a knock-and-announce violation itself produces the discovery of evidence—for example, a statement of a startled occupant. And, absent legitimate concerns over safety or destruction of evidence, the risk that occupants may mistake the police for intruders gives the police ample incentives to announce their